REA LAW JOURNAL

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TAKE NOTICE

"To transact extraordinary business at a regular members' meeting requires notice of purpose." So say the court and texts. Fletcher, Corporations (perm. ed.), Section 2009; Thompson, Corporations (3rd ed.), Section 915; Des Moines Life and Annuity Company v. Midland Ins. Co., 6 F.(2d) 228 (Minn. 1925); Johnson v. Tribune Herald Co., 118 S.E. 810 (Ga. 1923); Bagley v. Reno Oil Co., 50 Atl. 760 (Pa. 1902); Jones v. Concord etc. Railroad, 38 Atl. 120 (N. H. 1892); contra, Warner v. Mower, 11 Vt. 385. The rule is simple, but its application revolves around the meaning of "extraordinary business" and the sufficiency of the notice.

Extraordinary business has been defined as business within the corporate powers but outside the scope of usual transactions. As is generally the case, the definition itself requires defining. Examination of decisions reveals that courts have considered the following transactions to be extraordinary: (This list is by no means exhaustive.)

(1) Amending bylaws (Bagley case, supra). (2) Increasing capital stock (Jones case, supra). (3) Selling all assets (Des Moines case, supra; Starrett Corp. v. Fifth Ave. & 29th Street Corp., 1 F. Supp. 868 (N. Y. 1932)). (4) Authorizing directors to amend charter (Johnson case, supra). (5) Electing directors (Dunster v. Bernards Land & Sand Co., 65 Atl. 123 (N. J. 1906)).

At the outset we must distinguish between notice of the meeting and notice of the purpose of the meeging. Where extraordinary business is transacted a notice of the meeting is insufficient without the notice of purpose. Often the notice of the meeting will contain a general clause "to transact any other business that may be brought before the meeting". Apparently this is a legally meaningless phrase which custom dictates that lawyers insert in notices (and sometimes in the bylaws) to gloss the documents. Regardless of its literal meaning the courts have been uniform in holding that the clause does not permit the transaction of extraordinary business where the notice did not specifically advise that the particular extraordinary business was to be considered at the meeting. In Dolbear v. Wilkinson, 156 Pac. 488 (Cal. 1916), the election of directors without notice of this specific purpose was held invalid regardless of the presence of the general clause in the notice.

In Bushway Ice Cream Co. v. Bean Co., 187 N. E. 537 (Mass. 1933), the call of the annual stockholders' meeting restricted the purpose to election of officers and to all action that might properly come before the meeting in respect of the above matter. The bylaws were amended at the meeting. In holding the amendments to the bylaws invalid the court stated at page 539:

"The only such 'matter' was the election of the designated officers. In any event, such an indefinite reference cannot embrace a subject of such importance as changes in the bylaws."

The same reasoning is applicable to the general clause (although it is not as restrictive) under discussion.

In the Jones case, supra, a statute permitted the increase of capital stock "at any meeting called for the purpose". A bylaw provided that: "Any business within the power of the corporation may be transacted at annual meetings although the subject thereof is not specified in the notice." The notice of the annual meeting merely recited that its purpose was to act on the report of the directors "and to transact any other business that may be brought before the meeting". The court held that the bylaw provision was inconsistent with the statute. This might seem to indicate that in the absence of the statute, an increase of stock, which is extraordinary business, would have been valid at an annual meeting without specifying that particular purpose in the notice. In view of the fact, however, that the notice contained the general clause and that the notice was deemed insufficient, we may properly conclude that the general clause alone would not permit the transaction of extraordinary business.

Oftentimes the bylaws specify business to be transacted at regular meetings. In such case the bylaws constitute notice but only of the extraordinary business specifically mentioned. In Rogers v. Hill, 60 Fed.(2d) 109 (C.C.A. 2d, 1932), the bylaws provided that at an annual meeting any business could be transacted without notice of the object of the meeting. The notice contained a statement: "At this meeting there will be presented for consideration and acted upon a proposed bylaw providing for participation by certain officers of the Company in profits . . .". It was held that this sufficiently informed shareholders that consideration would be given to payment to certain officers of a contingent salary. The action taken at the meeting increasing salaries of officers was held, therefore, to be valid. By implication this decision shows that the bylaw provision itself would have been insufficient notice to the shareholders to permit the transaction of this extraordinary business.

Suppose the bylaws state that the annual meeting shall be held "for the purpose of electing directors, passing upon reports covering the previous fiscal year and transacting such other business as may come before the meeting". In such case the bylaws constitute notice but only of the extraordinary business specifically mentioned. The directors may be elected and reports approved without further notice. If, however, it is sought to authorize a corporate mortgage the general clause "such other business as may come before the meeting" is powerless to waive the requirement of notice to transact extraordinary business other than electing directors and approving reports. It follows that, notwithstanding the broad provision of the bylaw, notice of the purpose to authorize the corporate mortgage would be required.

It is not overlooked that lack of such notice of purpose, even in the face of a statute, charter or bylaw requiring it, may be cured by (1) full presence and participation -- Dolbear v. Wilkinson, supra; Goldbluff Mining Co. v. Whitlock, 55 Atl. 175 (Conn. 1903); Riesterer v. Horton, 61 S.W. 238 (Mo. 1901), (involving the validity of mortgages to secure bonded indebtedness); (2) waiver of notice -- In re Green Bus Lines, 2 N.Y.S.(2d) 556 (1938); Davidson v. Parke, 299 N.Y.S. 960 (1937); Granite v. Miller, 87 S.E. 897 (Ga. 1916); (3) laches -- Thompson, ibid, Sec. 915; Central Trust Co. v. Condon, 67 Fed. 84 (Tenn. 1895); Zabriskie v. The Cleveland, Columbus and Cincinnati R. R. Co., 16 L. Ed. 488 (1859); (4) ratification or estoppel -- Gentry-Futch Co. v. Gentry, 106 So. 473 (Fla. 1925); Thompson, ibid, Sec. 914; Fletcher, ibid, Sec. 2106; Central Trust Co. case, supra. It must also be pointed out that where stockholders have a right to and do waive questions of irregularity of notice, third persons cannot raise such questions. Fletcher, ibid, Sec. 2011; Thompson, ibid, Sec. 913; Beecher v. Marquette and Mill Co., 45 Mich. 103, 7 N. W. 695 (1881).

Edith Hertz - Assistant Counsel

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Municipalities - Liability of a municipality and a light company for injuries caused by electric light poles in the public highways.

The Duquesne Light Company erected a pole to bear electric wires in a public highway. The pole was situated 122 feet from a sharp curve and almost in the center of the 50-ft. highway. It was painted with black and white stripes for a considerable height, and there was a light on the top, although the evidence showed that the base of the pole was poorly illuminated. The Company had received permission from the City of Pittsburgh to erect the pole in that particular spot. Plaintiff was driving as a passenger in M's automobile, and the car collided with the pole, injuring him. Plaintiff sued the Light Company and the City to recover damages for the injuries he had sustained, alleging that the pole had been negligently erected and maintained. M was brought in as party defendant by the other defendants. The jury found for plaintiff against M and the City, but held that the Light Company was not liable. From the judgment entered thereon, M and the City appealed. Held, judgment reversed, and cause remanded. Nelson v. Duquesne Light Co., et al, 12 A.(2d) 299 (Pa. 1940).

The jury's verdict was inconsistent, since, although the jury could have found against both the City and Light Company, if it found for the Light Company it must also find for the City, the latter's liability being only secondary to that of the former.

The court, after an extensive review of the authorities, stated these general considerations: A municipality which has full and complete control of the streets and highways within its limits is liable if it fails to exercise reasonable care to keep these in a reasonably safe condition for travelers. Although the municipality, by statute, is entitled to grant permission to an electric company to place poles in the city streets, it lacks power to grant permission to set up the poles in such a fashion as to endanger travelers on the public ways. This is so even though, unlike the statute dealing with telephone poles, the statute empowering the City to grant permission to erect electric light poles is silent on the question of how the poles shall be erected, since it is an implied condition of the statute that the City has no power to grant permission to erect poles in a dangerous manner. And such statutes do not absolve a municipality from the duty of keeping its streets clear of obstructions which are both dangerous and unnecessary and which, with reasonable care, could be avoided.

The Utility Company is saved from having erected a nuisance by the permission granted to it by the City, but it is still duty bound to erect its poles in a way that is reasonably safe to travelers on the public highways.

Reviewing the facts in the case, and with a lively awareness of the speed of automobiles and the increase in motor traffic, the court held that a jury could reasonably find that the erection and

maintenance of this particular pole constituted negligence on the part of the City and the Light Company.

The court further disposed of the argument of the City that the negligence of M superseded its own negligence, in holding that a jury could find that a reasonable man would have anticipated M's actions, M not being "extraordinarily negligent", considering that one does not usually find poles in a city street directly in the line of traffic.

The case of Birmingham Electric Co. v. Lawson, 194 So. 659 (Ala. 1940), is closely parallel to the reported case, both on its facts and the conclusion reached by the court on the law.

Negligence - Evidence concerning danger involved in maintaining wires close to bridge.

Decedent was a workman engaged in the repair of a bridge. Defendant maintained without sign or warning a high voltage electric wire parallel to the bridge at a point eleven feet above the bridge. While decedent was engaged in removing a steel girder it came in contact with the wire and he was electrocuted. Decedent had been working on the bridge two or three weeks prior to the accident, and there was evidence that his fellow workmen knew the dangerous character of the wire. The trial court rejected evidence that the wire was six feet away from the bridge at another point, and that the foreman stopped work on the bridge after the accident since he considered the place too dangerous. The trial court also rejected testimony of experts that the condition maintained by the defendant was dangerous, and that defendant could have located the wire further away from the bridge without any additional expense. A verdict was directed for defendant, and from the judgment entered thereon plaintiff, decedent's administrator, appealed. Held, judgment affirmed. Morton's Adm'r v. Kentucky-Tennessee Light & Power Co., 138 S.W.(2d) 345 (Ky. 1940).

The evidence as to the proximity of the wire at a point other than that at which injury occurred, and the foreman's action after the injury, was properly rejected as incompetent. The testimony of the experts as to the dangerousness of the condition maintained by defendant was properly inadmissible since it is opinion evidence on the ultimate question to be decided by the jury, and the jury will not be aided by such opinion since it can determine that question for itself. Judgment was properly directed for defendant on the question of negligence, since the position of the wire was not dangerous to decedent and defendant could not have reasonably anticipated decedent's action in moving a girder eleven feet over the bridge.

Suit against the contractor and surety on the contractor's bond by plaintiff who furnished materials and supplies.

Defendant contractor entered into an agreement with the City to build for it an electric distribution system. Defendant furnished a bond signed by it and the co-defendant surety, conditioned on the payment by defendant of moneys due all persons supplying labor in the prosecution of the work covered by the contract. The bond contained no provision for the protection of those furnishing materials and supplies, nor did it contain any provision for the service of process. Plaintiff furnished defendant with materials and supplies necessary for the execution of defendant's contract with the city. Upon defendant's failure to pay, plaintiff brought suit on the bond for the value of the materials and supplies he had furnished, and he served the President of the Board of City Commissioners of the city. Defendant applied for mandamus to review an order overruling a motion to quash service of the summons. Held, mandamus denied. Universal Electric Const. Co. of Alabama v. Robbins, 194 So. 195 (Ala. 1940).

Whether the service of the summons was valid depended upon the applicability

of a statute requiring the furnishing of a certain kind of bond by persons "entering into a contract for the . . . construction . . . of any . . . public work" with the city. This statutory bond protected not only those supplying labor, but also those furnishing materials and supplies; also this statutory bond provided that service could be made upon the President of the Board of City Commissioners. The court ruled that the statute was applicable because the building of an electric distribution system for the city was a public work. Defendant contractor intended to comply with the statutory bond when it furnished its bond, since it was only upon the furnishing of the statutory bond that it could undertake the work. And the defendant surety intended to comply with the statutory bond since it knew the purpose of the bond defendant contractor sought. Hence, the court ruled, it would read into the bond the provisions of the statute. This validated plaintiff's service of process and extended the protection of the bond to him as a supplier of materials.

Administrative Interpretation - Exemption of Public Utility Subsidiaries as to Certain Securities Issued to the REA.

A recent rule adopted by the Securities and Exchange Commission provides:

"(a) Exemption - Any public-utility company which is a subsidiary company of a registered holding company shall be exempt from the obligations, duties, or liabilities imposed by the Act or any rule thereunder, on such company as a subsidiary company, with respect to the issue and sale to the Rural Electrification Administration, of any security of which it is the issuer in an amount not exceeding in any one calendar year 2 per cent of the outstanding funded indebtedness, plus the aggregate of the capital and surplus accounts of the issuer as of the end of the prior calendar year. Such company shall also be exempt with respect to the pledge of any security or other property as collateral for any security so issued or sold, and with respect to the redemption or retirement, in whole or in part, of any such security.

"(b) Certificate of notification - Within ten days after the issue or sale of any security exempt under this rule, the issuer shall file with the Commission a certificate of notification on Form U-6B-2 containing the information prescribed by that form." (Rule U-3D-14 adopted in Release No. 2166, effective July 12, 1940.)

REA Cooperatives Exempt from Utah Sales Tax

The State Tax Commission of Utah has recently ruled that sales of electricity by an REA cooperative are not subject to the Utah Sales Tax. Chapter 63 of the Laws of 1933 imposes a sales tax of 2% on the amount paid to electric corporations as defined by Section 76-2-1 of the Revised Statutes of Utah (1933) for electricity furnished for domestic or commercial consumption. Section 76-2-1 defines "electrical corporation" as including:

" . . . every corporation . . . owning, controlling, operating or managing any electric plant, or in any wise furnishing electric power, for public service within this state, except where electricity is generated on or distributed by the producer through private property alone, solely for his own use or the use of his tenants and not for sale to others.

In Garkane Power Co. v. Public Service Commission, 100 P.(2d) 571 (1940), the Supreme Court of Utah, in determining that an REA cooperative was not subject to the jurisdiction of the Public Service Commission, held that it did not come within Section 76-2-1 because it served members only and did not furnish electricity "for public service". Thus, on the basis of this decision, the Commission ruled that since REA cooperatives do not come within the definition of electric corporation under Section 76-2-1, they are not subject to this tax.

The Legal Division welcomes the following attorneys to the staff:

David A. Brody

Columbia Law School; Legislation Editor of the Columbia Law Review (1939). Mr. Brody will be in the Opinion Unit.

J. Holland Crevase

University of Florida Law School. Mr. Crevase practiced law in Florida for several years and then handled tax matters for the Internal Revenue Bureau, later was an attorney for P.W.A. and an examiner for the N.L.R.B. He will be in the Operations Section.

Joseph Forer

Managing Editor of the University of Pennsylvania Law Review (1935); formerly attorney in the Treasury Department and later Review Attorney with the N.L.R.B. Mr. Forer is author of: Discounts in Trust Investments (1940) 24 Minn. L. Rev. 201. He will be in the Loan Section.

Bernard Gekoski

Case Editor of the University of Pennsylvania Law Review (1935). Mr. Gekoski has been engaged in the general practice of the law in Philadelphia. He was associated with the firm of Wexler & Weisman. He will be in the Loan Section.

Samuel Z. Gordon

Harvard Law School; member of the Board of Student Advisers in charge of the Ames Competition. Mr. Gordon will be in the Opinion Unit.

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A-294 Amending certificate of incorporation to change name -- Illinois.

A-295 Jurisdiction of notary public in Missouri.

A-297 Power of REA to expend funds for non-civil-service employees of WPA project.

A-298 Iowa bank as trustee of real property in Minnesota.

A-299 Nature of judicial review of commission's orders in New Jersey.

A-300 Right of Administrator to delegate authority to release borrowers' automobiles from mortgage lien.

A-301 Exercise of eminent domain by borrowers in Tennessee.

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A-304 Amending bylaws, limiting proxy voting, restricting right of member to vote -- Kentucky.

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A-306 Legal aspects of Ohio cooperatives receiving service from Michigan cooperative.

A-310 Power of REA to employ aliens as engineers.

A-311 Authentication of D. C. acknowledgment for recording in Michigan and New Jersey.

A-312 Personal correspondence by a government employee concerning politics as violating the Hatch Act.

A-286 Execution of mortgage with broad consent of shareholders -- Missouri. (2d memo)

A-313 Public Service Commission regula-

tion of transmission lines over railroad tracks -- Indiana.

A-314 Power of REA to finance the acquisition of existing lines.

A-315 Right of directors of cooperative to mortgage property without consent of members -- North Dakota.

A-316 Shipment of billboards to cooperatives under "free freightage act".

A-317 Necessity for statewide organization under Indiana statutes.

A-319 Assignability of highway franchises in Iowa.

A-325 Energy contract with public utility with restrictions on scope of service as contrary to public policy.

A-281 Supplementary memo to A-281. (2d memo)

TAX MEMORANDA RECENTLY RECEIVED

T-247 Recent New York decision on illegality of over-assessment for tax purposes - Guaranty Trust Co. v. Cook.

T-248 Secretary of corporation not an employee under Oklahoma Unemployment Tax Act.

T-249 Recent N. Y. decisions on valuation and assessment.

T-250 Domicile of Federal employee under District Income Tax Law.

T-251 Kentucky franchise tax on REA cooperatives

T-252 Taxing member according to his individual share in cooperative -- Iowa.

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Cumulative Supplement V (1-3-35 to 11-4-39) to The Code of the Laws of the United States of America.

Digest of the U. S. Supreme Court Reports - 1940 Pocket Parts for 11 volumes.

Arizona - 1939 Acts.

Indiana - 1940 Replacement Volume 8 of Burns Indiana Statutes Annotated of 1933 - Secs. 39-101 to 47-2316.

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Book 30 - Labor Law
Book 32 - Lien Law
Book 55 - State Finance Law.

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